

Formal Action # 98-3740-III

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
Petitioner,

v.

NATIONAL FULFILLMENT, INC.,
a domestic corporation,
Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by National Fulfillment, Inc. of Lebanon, Tennessee ("Respondent"), to John Knox Walkup, Attorney General and Reporter for the State of Tennessee ("Attorney General").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance (the "Division") and the Attorney General have conducted an investigation of specific business practices of Respondent. These practices include an alleged failure to comply with the Federal Trade Commission's Mail and Telephonic Order Rule ("FTC Mail Order Rule," 16 C.F.R. Part 435). Specifically, Respondent has received on behalf of its marketers/clients monies from consumers for products which it did not have available for shipment at that time but reasonably expected to have available for shipment. In these cases,

advertisements represented specific time frames for delivery but the actual shipment of the products to consumers was not accomplished in that time frame due to lack of product inventory. Some consumers never received their product(s). Additionally, Respondent in some cases failed to properly (1) notify consumers of delays in shipment, and (2) give consumers the election to cancel the order and receive a full refund. Cases in which cash refunds were requested, Respondent was unable to provide timely refunds to consumers. Respondent's business practices are more fully described in the accompanying Petition. As a result of the investigation, the Division and the Attorney General have determined that certain acts and practices of Respondent have violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 et seq. (the "Act").

B. Respondent denies any wrongdoing. Since being contacted by the Attorney General regarding the allegations set forth in paragraph A, Respondent has taken affirmative steps to insure that its business practices are in full compliance with all laws.

C. Respondent desires to give this Assurance of continued compliance, and the Attorney General desires to accept it.

D. By way of general background and information, National Fulfillment, Inc. is a fulfillment house which acts as the shipper for various manufacturers and product wholesalers (hereinafter referred to as "marketers"). Typically, a marketer will contact National Fulfillment, Inc. and an agreement is reached about the amount to be charged by National Fulfillment, Inc. for receiving consumer orders and shipping products to consumers. The marketer then forwards stock to National Fulfillment, Inc. where it is stored until the stock has been depleted. The marketer is notified by National Fulfillment, Inc. to re-stock the product for additional consumer orders.

National Fulfillment, Inc. does not "promote" or "advertise" any products, as those terms are usually defined. That is, advertisements and/or promotions are not designed, placed or paid for by National Fulfillment, Inc., and the terms of offerings are not determined by National Fulfillment, Inc. However, National Fulfillment, Inc.'s Tennessee address frequently appears on the order forms that appear within advertisements for products the company ships, and consumers who place written orders on these order forms are instructed to mail them to National Fulfillment, Inc.'s address.

The consumers' orders transmitted directly to National Fulfillment, Inc. by mail order or by telemarketing companies hired by marketers are logged into a computer program at National Fulfillment, Inc.'s warehouse and are then filled and shipped directly to the consumer.

In addition, consumers who for various reasons request a refund for the product send such requests to National Fulfillment, Inc. and ultimately obtain the refund from the marketer. National Fulfillment, Inc. has developed specific computer programs to manage consumer refunds.

National Fulfillment, Inc. represents and warrants that it is not in the business of manufacturing and does not produce or design any products it distributes. National Fulfillment, Inc. does not engage in any

quality control inspections for the benefit of its customers (i.e., the marketers) or the ultimate consumer who purchases the product. National Fulfillment, Inc. does not, therefore, make any representation or guarantee as to the quality of any product it distributes.

Because National Fulfillment, Inc. does not directly advertise or determine the terms of any offering, it makes no direct offers of "free" merchandise that may appear within the advertisements for products it distributes. National Fulfillment, Inc. represents and warrants, however, that in any offering which includes a "free" gift or product, the "free" gift or product is distributed in the same manner and within the same time limitations as those products for which a consumer has paid a purchase price.

NOW, THEREFORE, acting pursuant to Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

1. BUSINESS PRACTICES

ACCORDINGLY, it is hereby agreed that upon approval of the Court, Respondent shall be permanently enjoined and bound from engaging in the practices set forth herein:

1.1 Respondent agrees to abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 et seq., including, but not limited to sections 47-18-104(a) and (b)(27), which prohibit any and all unfair and/or deceptive acts or practices and/or the manner in which the product or service will be delivered.

1.2 Respondent agrees not to fulfill orders based upon any advertisement for merchandise that represents or implies that a consumer transaction confers or involves rights, remedies or obligations that it does not confer or involve. Unless specifically directed in writing by the affected consumer, this prohibition includes but is not limited to:

(A) Providing or claiming specific shipment guarantee dates or time periods for advertised products, if in fact the product cannot be shipped within the time stated in the advertisement;

(B) Representing that orders will be processed promptly if in fact the merchandise cannot be shipped within thirty (30) days of receipt of payment; and

(C) Representing to consumers that the refund or guarantee confers rights, remedies or obligations that the refund or guarantee does not have.

1.3 Respondent agrees to ship all ordered merchandise within (1) the time stated in the initial advertisement, or (2) if no time limit is given in the initial advertisement, within thirty (30) days of the receipt of a properly completed order from a consumer unless otherwise specifically directed, in writing, by the consumer.

1.4 When directly issuing a consumer refund, the Respondent shall:

(A) Cases in which the product advertisement offers a "money back guarantee," or words of similar import, issue a full refund, including the cost of the product, shipping, handling, applicable sales tax and all other costs associated with purchasing or returning the product, within twenty-one (21) days of the receipt of the request.

(B) Cases in which the product advertisement clearly and conspicuously limits or excludes any part of the total purchase cost in a consumer refund, issue all refundable amounts within twenty-one (21) days of the receipt of the refund request.

(C) In the event a product is damaged or defective when received by the consumer and a refund is requested, issue a full refund, including the cost of the product, shipping, handling, applicable sales tax and all other costs associated with purchasing the product, within twenty-one (21) days of the receipt of the request.

1.5 Cases in which a consumer refund request must be presented by Respondent to a marketer for issuance and the refund will not be received by the consumer within twenty-one (21) days of the request, Respondent shall notify the consumer of the receipt of the request, the action being taken and the date by which the consumer may expect to receive the refund.

1.6 Respondent agrees not to directly or indirectly acquiesce in or fulfill orders based on any advertisement containing an offer to sell goods or services when the offer is not a bona fide effort to sell the goods or services as advertised. An offer to sell shall not constitute a bona fide offer if Respondent cannot deliver or supply the goods or services offered within thirty (30) days of receipt of payment unless within the same thirty (30) day period:

(A) Respondent notifies all consumers in writing, without prior demand, of the reasons for any anticipated delay in shipment of the advertised product, and;

(B) Offers each consumer an option of either consenting to a delay in shipment or canceling the order and receiving an exact, full and prompt refund.

1.7 Respondent agrees not to directly or indirectly fail to provide any consumer with a definite revised shipping date when offering a consumer the option provided in paragraph 1.6 above unless: (1) Respondent has a reasonable basis for informing the consumer that Respondent is unable to determine the length of any delay in shipment, and (2) Respondent informs the consumer of the reason(s) for the delay.

1.8 Respondent agrees to offer any consumer, clearly and conspicuously in writing and without prior demand, a renewed option pursuant to paragraphs 1.6 and 1.7 when Respondent is unable to ship

merchandise ordered by the consumer by the definite revised shipping date.

1.9 Respondent agrees not to directly or indirectly approve or fulfill orders based on any advertisement which represents that a consumer will be entitled to a monetary refund unless such refund can be processed within twenty-one (21) days of receipt of either:

(A) A written or telephonic refund request from a consumer who has not received the ordered product; or

(B) A written or telephonic refund request from a consumer who has returned the ordered product which product has been received by National Fulfillment, Inc.

1.10 When contacted by a consumer, Respondent agrees to clearly and conspicuously disclose the refund, exchange or return policies, and any limitations thereto, in relation to any offer or inducement to purchase a good distributed by Respondent.

1.11 Upon any written or telephonic request, Respondent agrees to provide identifying information regarding the product's marketer, including the name of the company, address and telephone number, to any consumer whose complaint relates to a refund or product quality, including complaints alleging that a product is defective.

1.12 Respondent agrees to continue its current practice of not debiting a consumer's credit card account without his or her knowledge and consent until the merchandise is actually shipped to the consumer.

1.13 Respondent agrees to continue to fully comply with all provisions of the Federal Trade Commission's Mail and Telephonic Order Rule, 16 C.F.R. Part 435.

1.14 Respondent agrees to continue to fully respond to all consumer complaints and inquiries regardless of the source or method of receipt within ten (10) business days of receipt by Respondent.

1.15 Respondent agrees to continue to maintain a sufficient number of customer service representatives actively working on telephone lines to respond to telephonic consumer inquiries and complaints. Respondent represents and warrants that it does not place consumers on hold for unreasonable periods of time for the purpose of avoiding consumer inquiries or complaints.

1.16 In response to the Attorney General's concerns, Respondent instituted procedures and agrees to continue those procedures to ensure that Respondent does not continue to act as a fulfillment agency for any vendor that demonstrates a pattern of failing to provide consumer refunds or fails to provide sufficient products to Respondent in a timely manner for shipment to consumers. Examples of the procedures voluntarily instituted by Respondent include: (1) the enhancement of credit and refund notification cards to consumers, (2) improvement in the use of delay and notification notice cards to consumers, (3) reassignment of the "returns" department to the customer service division to reduce the

response time, (4) development of a negotiable contract requirement with marketers to establish a refund account so that refunds can be issued directly by National Fulfillment, Inc., and (5) the designation of a specific person to respond to official complaints.

1.17 Respondent agrees not to do business with any entity that, to Respondent's knowledge, engages in activities which directly or indirectly violate this Assurance.

1.18 Respondent agrees that any consumer transaction which involves any violation of this Assurance is null and void at the consumer's election.

1.19 Respondent agrees not to directly or indirectly limit the damages or recovery to which consumers may be entitled from Respondent under Tennessee law.

2. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering into and enforcing this Assurance and Agreed Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including the enforcement of compliance therewith and penalties for violation thereof. Respondent agrees to pay all court costs and attorneys' fees associated with any successful petitions to enforce any provision of this Assurance and Agreed Order against Respondent.

3. REFUNDS

3.1 Except as hereinafter provided in this paragraph, Respondent represents and warrants that each and every consumer listed in Exhibit A has received the respective product listed in Exhibit A or a full refund in the amount listed in Exhibit A. If a consumer listed in Exhibit A has not received the respective product listed in Exhibit A or the respective refund in the amount listed in Exhibit A, then Respondent shall issue a full refund in the amount listed in Exhibit A to that consumer within thirty (30) days of entry of this Assurance.

3.2 Respondent represents and warrants that it never received a complaint from the consumers listed in Exhibit B or that Respondent received a complaint and resolved the dispute to the satisfaction of the consumer listed in Exhibit B. If Respondent receives information from the State or the consumer listed in Exhibit B that the consumer's complaint has not been resolved satisfactorily, then Respondent will, if requested in writing by Consumer or the State, issue the consumer a full refund in the amount listed in Exhibit B within thirty (30) days of receiving this information from the State or the consumer listed in Exhibit B.

3.3 Except as hereinafter provided in this paragraph, Respondent represents and warrants that each and every consumer listed in Exhibit C has received the respective refund in the amount listed in Exhibit C. If

Respondent receives information from the State or the consumer listed in Exhibit C that a consumer listed in Exhibit C has not received his/her refund, then Respondent will, if requested in writing by Consumer or the State, issue the consumer a full refund in the amount listed in Exhibit C within thirty (30) days of receiving this information from the State or the consumer listed in Exhibit C.

3.4 Except as hereinafter provided in this paragraph, Respondent represents and warrants that each and every consumer listed in Exhibit D has received the respective product listed in Exhibit D. If Respondent receives information from the State or the consumer listed in Exhibit D that a consumer listed in Exhibit D has not received his/her product, then Respondent will, if requested in writing by Consumer or the State, issue the consumer a full refund in the amount listed in Exhibit D within thirty (30) days of receiving this information from the State or the consumer listed in Exhibit D.

3.5 Respondent represents and warrants that each and every consumer listed in Exhibit E has either received the respective product listed in Exhibit E or the respective refund in the amount listed in Exhibit E. The Division's records and/or consumer statements indicate that the consumer complaints listed in Exhibit E have been resolved by Respondent to the consumer's satisfaction. If, however, contradictory information is provided to Respondent, then Respondent within thirty (30) days will, if requested in writing by Consumer or the State, provide to the consumer either a refund for the amount listed in Exhibit E or proof that the consumer received either the respective product or refund listed in Exhibit E.

3.6 Except as hereinafter provided in this paragraph, Respondent represents and warrants that each and every consumer listed in Exhibit F has received the respective product listed in Exhibit F or a full refund in the amount listed in Exhibit F. If a consumer listed in Exhibit F has not received the respective product listed in Exhibit F or the respective refund in the amount listed in Exhibit F, then Respondent will, if requested in writing by Consumer or the State, issue a full refund to the consumer in the amount listed in Exhibit F to that consumer within one-hundred-twenty (120) days of entry of this Assurance.

3.7 Respondent acknowledges that the State expressly relies upon these representations and warranties, and that if they are false, misleading, deceptive, unfair or inaccurate, in any way, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if the State so elects.

3.8 If Respondent is unable to locate consumers listed on Exhibits A through F attached who are entitled to a product or a refund, those funds due such consumers shall be treated as unclaimed property in the possession of the State of Tennessee pursuant to the Uniform Disposition of Unclaimed Property Act, Tenn. Code Ann. §§ 66-29-101 et seq. These funds may be delivered to the Treasurer prior to the statutory due date of one (1) year set forth in Tennessee Code Annotated section 66-29-110, covering unclaimed property held by courts, public officers and agencies. Respondent shall provide a report to the Attorney General within six (6) months of the entry of the Assurance and Agreed Order which details the amount delivered to the Treasurer for treatment as unclaimed property under the State statute. Respondent shall continue to provide this information every six (6) months until all funds have been claimed and/or returned to Respondent. The Respondent shall provide any information required by the

Treasurer to treat the refunds as unclaimed property.

3.9 As to the consumers listed on Exhibits A through F attached, within six (6) months of entry of the Assurance, Respondent shall file with the Attorney General the following information and shall supplement the information as is necessary:

A. An alphabetical list of the name and address of each consumer who requested a refund.

B. An alphabetical list of the name and address of each consumer who received a refund, the amount of each consumer's refund and the total amount of all refunds provided.

C. A report verifying and certifying that consumers listed in Exhibits A, B, C, D and F who requested a refund, in fact, received a full refund or the product (as applicable under this Assurance).

3.10 The refunds outlined in Section 3 resolve known complaints received by Respondent and/or the State between 1994 and the date of entry of this Assurance and Order. This Assurance shall not be construed to require Respondent to pay refunds other than those listed in the accompanying Exhibits A through F. Nothing in this Assurance and Order shall prevent Respondent from making refunds to consumers if Respondent so elects.

4. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

4.1 Respondent shall pay the sum of Twelve Thousand and 00/100 Dollars (\$12,000.00) to the State of Tennessee for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. This payment shall be made by providing a certified check made payable to the State of Tennessee to the Attorney General or his designated representative on the day of execution of this Assurance.

5. MONITORING AND COMPLIANCE

5.1 Upon request, Respondent agrees to provide books, records and/or documents to the State at any time, and further, to informally, or formally under oath, provide testimony and/or other information to the State relating to compliance with this Assurance. Respondent shall make any requested information available within ten (10) business days after the request, at the Office of the Attorney General or at such other location within the State of Tennessee as is agreeable to Respondent and the Attorney General or his designated representative. This section shall in no way limit the State's right to obtain documents, information or testimony pursuant to any federal or state law, regulation or rule.

6. PRIVATE RIGHT OF ACTION

6.1 Nothing in this Assurance shall be construed to affect any private right of action that a consumer may hold against Respondent.

7. PENALTY FOR FAILURE TO COMPLY

7.1 Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is prima facie evidence of a violation of the Tennessee Consumer Protection Act.

7.2 Respondent understands and acknowledges that pursuant to the provisions of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-108 (c), any knowing violation of the terms of this Assurance and Agreed Order is punishable by civil penalties of not more than Two-Thousand Dollars (\$2,000.00) for each violation, in addition to any other appropriate sanctions, including, but not limited to, contempt sanctions and the imposition of attorneys' fees and civil penalties.

8. VENUE

8.1 Pursuant to Tennessee Code Annotated section 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

9. REPRESENTATIONS AND WARRANTIES

9.1 Respondent represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent believes that the Assurance and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith.

9.2 Respondent represents that signatories to this Assurance have authority to act for and bind the Respondent.

9.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity for the purpose of engaging in acts set forth and prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance.

9.4 Neither Respondent nor anyone with authority acting on its behalf shall state and/or imply and/or cause to be stated or implied that the Attorney General, the Division, or any other governmental unit of the State of Tennessee has approved, sanctioned or authorized any practice, act or conduct of the Respondent.

9.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's business practices.

9.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of its officers and directors.

9.7 National Fulfillment, Inc. represents that it is the true legal name of the entity and is the proper party to enter into this Assurance and Agreed Order.

9.8 This Assurance and Agreed Order may only be enforced by the parties hereto.

9.9 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

9.10 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

9.11 This Assurance shall be binding and effective against Respondent upon both parties signing the Assurance.

9.12 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State and the people of the State of Tennessee. In addition, this Assurance shall not bar the State or any other governmental entity from enforcing other laws, regulations or rules against Respondent relating to any of Respondent's practices, including those alleged in this Assurance and the State's Petition, except insofar as this Assurance resolves the specific disputes between the Consumer Protection Division of the Attorney General's Office and the Respondent described in the State's Petition.

10. COMPLIANCE WITH OTHER LAWS

10.1 Nothing in this Assurance and Order shall be construed as relieving Respondent of the obligation to comply with any other state or federal law(s), regulation(s) or rule(s), nor shall any of the provisions of this Assurance and Order be deemed to be permission to engage in any acts or practices prohibited by such law(s), regulation(s) or rule(s).

11. FILING OF ASSURANCE

11.1 Immediately upon the execution of this Assurance, the Attorney General or his designated representative shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which he may have to be heard in connection with judicial proceedings upon said Petition. Respondent agrees to pay all court costs of filing such Petition, Assurance and Agreed Order. The Assurance, annexed to the Agreed Order, is made a part of and is incorporated into the Agreed Order upon approval of the Court.

**12. APPLICABILITY OF ASSURANCE TO RESPONDENT
AND ITS SUCCESSORS**

12.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to it, to each of its officers, directors, agents, successors and assigns.

13. NOTIFICATION TO STATE

13.1 For five (5) years following execution of this Assurance, Respondent shall notify the Attorney General, c/o Gary Axisa, Assistant Attorney General, Consumer Protection Division, 425 Fifth Avenue North, Nashville, Tennessee 37243-0491, in writing at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries or any other changes in Respondent's status that may effect compliance with obligations arising out of this Assurance.

14. COSTS

14.1 No costs shall be taxed against the State as provided by Tennessee Code Annotated section 47-18-116.